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VB

| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. |
|-----------------|-------------|----------------------|---------------------|
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08/288,415 08/10/94 BRUGGER

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001095
MELVYN M KASSENOFF
NOVARTIS CORPORATION
PATENT AND TRADEMARK DEPT
564 MORRIS AVENUE
SUMMIT NJ 07901-1027

HM22/1028

EXAMINER

BAWA, R

| ART UNIT | PAPER NUMBER |
|----------|--------------|
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1615

27

DATE MAILED:

10/28/99

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary

| | |
|------------------|------------------------|
| Application No. | Applicant(s) |
| 08/288,415 | Brugger et al. |
| Examiner Bawa | Group Art Unit 1615 |

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

Period for Response

A SHORTENED STATUTORY PERIOD FOR RESPONSE IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a response be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for response specified above is less than thirty (30) days, a response within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for response is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to respond within the set or extended period for response will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Status

Responsive to communication(s) filed on 7-19-99.

This action is FINAL.

Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

Claim(s) 2-15 is/are pending in the application.

Of the above claim(s) _____ is/are withdrawn from consideration.

Claim(s) _____ is/are allowed.

Claim(s) 2-15 is/are rejected.

Claim(s) _____ is/are objected to.

Claim(s) _____ are subject to restriction or election requirement.

Application Papers

See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

The proposed drawing correction, filed on _____ is approved disapproved.

The drawing(s) filed on _____ is/are objected to by the Examiner.

The specification is objected to by the Examiner.

The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

All Some* None of the CERTIFIED copies of the priority documents have been received.

received in Application No. (Series Code/Serial Number) _____.

received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____.

Attachment(s)

Information Disclosure Statement(s), PTO-1449, Paper No(s). _____ Interview Summary, PTO-413

Notice of References Cited, PTO-892 Notice of Informal Patent Application, PTO-152

Notice of Draftsperson's Patent Drawing Review, PTO-948 Other _____

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Detailed Action

Claims 2-15 are still rejected under 35 U.S.C. 103(a) as being unpatentable over Gennaro in view of the Stetz et al.

A clear case of *prima facie* obviousness has been established in view of the cited art and reasons already of record have been fully considered but they are not persuasive.

Applicant's arguments filed on July 19, 1999 have been fully considered but they are not persuasive.

The above-mentioned claims are directed towards a composition per se; its future intended use is not at issue from a patentability point of view. No criticality of the concentrations of the ingredients has been established. There is no comparative data of record in this case that (i) presents any unexpected results over the closest prior art; or (ii) establishes any improvements over the closest prior art.

Note that: (i) the cited art is analogous because it pertains to the field of the inventor's endeavor and is also reasonably pertinent to the particular problem with which the inventor is involved. *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992); (ii) a comprising-type language does not exclude other steps, elements or materials. *Cues Inc. vs. Polymer Industries*, USPQ2d 1847 (DC ND Ga 1988); (iii) it is well established that the claims are given the broadest interpretation during examination; (iv) a conclusion of obviousness under 35 U.S.C. 103(a) does not require absolute predictability, only a reasonable expectation of success; and (v)

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references are evaluated by what they suggest to one versed in the art, rather than by their specific disclosure. *In re Bozek*, 163 USPQ 545 (CCPA 1969).

In light of the foregoing discussion, the Examiner's ultimate legal conclusion is that the subject matter defined by the claims would have been obvious within the meaning of 35 U.S.C. 103(a).

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mr. Raj Bawa, Ph.D., whose telephone number is (703) 308-2423. The examiner can normally be reached on Tuesday through Friday from 7:30 AM to 6:00 PM.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Page, can be reached on (703) 308-2927. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3592.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

R.Bawa:BL

10/14/99

R.Bawa

RAJ BAWA, Ph.D.
PRIMARY EXAMINER